Supreme Court, U. S.
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No. 78-1906

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALBERT B. ALKEK

AND

FOREMOST PETROLEUM CORPORATION, INC.,
PETITIONERS,

v.

NEWMAN OIL COMPANY, ET AL.,
RESPONDENTS

REPLY MEMORANDUM

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The petition for a writ of certiorari presents the question whether a private nondiversity action sounding in common-law fraud, alleging that the defendant induced the plaintiff to enter into an unfavorable agreement by means of false and fraudulent promises and representations, is within the exclusive jurisdiction conferred on the federal district courts by the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 note. In their brief in opposition, respondents in effect enter a plea of confession and avoidance. They contend (1) that their claim of fraudulent inducement is not an assertion of common-law fraud

but rather an allegation that petitioners violated a federal regulation and (2) that the real question here concerns not jurisdiction but the existence of a federal cause of action. Neither of these contentions withstands analysis.

1. In their complaint, respondents alleged that petitioners, by means of false oral representations concerning their intentions with respect to future prices, had induced respondents to enter into written agreements pursuant to which Atlantic Richfield Company ("ARCO") assigned to petitioner Foremost Petroleum Corporation, Inc. ("Foremost"), ARCO's obligations to supply respondents with motor gasoline. See Pet. App. A, pp. 3a-4a. Both the district court and the court of appeals understood this allegation to constitute a claim of common-law fraud and treated it as such. Pet. App. B, pp. 10a, 15a; Pet. App. A, pp. 2a, 6a. The court of appeals explicitly stated that the threshold issue raised by this allegation was "the jurisdiction of the federal court over claims involving common-law fraud," Pet. App. A, p. 6a, and the court upheld the exercise of such jurisdiction.

Respondents now contend, apparently in acknowledgment that common-law fraud lies outside the scope of federal jurisdiction, that their allegation of fraud should be read as encompassing an allegation that ARCO and petitioner Foremost, in submitting the agreements to the Federal Energy Administration ("FEA") for approval, violated 10 C.F.R. § 205.203 (f).[1] Respondents defend the decision of the court of

[1] The regulation upon which respondents now rely does nothing more than recognize that false statements to the agency may be punishable under 18 U.S.C. § 1001. At bottom, therefore, respondents' new argument constitutes an effort to assert a cause of action based upon an alleged violation of a criminal statute. Petitioners maintain that they have submitted no false statement of any kind to the agency. But it should in any event be clear that there is no implied private right of action under 18 U.S.C. § 1001. Cf. *Chrysler Corp.* v. *Brown*, 47 U.S.L.W. 4434, 4438-44 (April 18, 1979).

appeals by arguing that their allegation of fraud, read in this manner, raises a question appropriate for decision by a federal court. There are two obvious fallacies in this line of reasoning.

First, the argument advanced by respondents here is not supported by their complaint. The complaint does not allege that petitioners made any false or fraudulent representation to FEA; it does not allege that the agreements, which set forth in full all data called for by FEA, omitted any material fact;[2] nor, finally, does it allege that the submission of the agreements to FEA violated 10 C.F.R. § 205.203(f). The federal question on which jurisdiction rests must appear on the face of the complaint. *E.g., Phillips Petroleum Co.* v. *Texaco, Inc.*, 415 U.S. 125, 127-28 (1974). Respondents cannot rely upon an untimely allegation of a regulatory violation as a basis for federal jurisdiction.

Second, respondent's suggestion that federal jurisdiction rests upon the allegation of a regulatory violation is inconsistent with both the specific disposition of this case by the court of appeals and the broad scope of that court's opinion. The court of appeals has re-

[2] The agreements were set forth on a standard government form, Form FEA 04-164, a copy of which appears at pages A-29 to A-31 of ARCO's petition in No. 78-1898. That form calls only for information about volumes, not about prices. See also Pet. App. A, pp. 3a-4a. The omission of any reference in the agreements to any alleged understandings concerning future prices therefore could not be a material omission within the meaning of 10 C.F.R. § 205.203(f).

manded this case for further proceedings on the question whether petitioners made false and fraudulent promises and representations to respondents. Pet. App. A, pp. 4a, 6a, 8a. The district court has not been limited to consideration of, nor has it even been directed to consider, the separate question whether the wholly different representations to FEA made together by respondents, petitioner Foremost, and ARCO violated the specific terms of any federal statute or regulation.[3] In other words, the federal question upon which respondents now rely for jurisdiction is not the question that will be before the district court. Moreover, the opinion of the court of appeals is by no means restricted in the narrow fashion respondents' argument would suggest: the court of appeals broadly held that federal jurisdiction, which under the ESA is exclusive, extends to any allegation of a fraudulent inducement to forego rights under the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 751 *et seq.*, whether or not any federal statute or regulation is alleged to have been violated in the process. Pet. App. A, pp. 6a-8a. This broad holding plainly warrants review by this Court.

2. Respondents contend that the issue decided by the court of appeals concerned not jurisdiction but the existence of a private cause of action. This contention is incompatible with the court's own analysis of this case. The court began its discussion of the issue by noting that "[a] substantial question has been raised on appeal as to the *jurisdiction* of the federal court over claims involving common-law fraud." Pet. App. A, p.

[3] The theory of liability advanced here by respondents would not appear to apply at all to petitioner Albert B. Alkek, who was not a party to the agreements submitted to FEA.

6a (emphasis added). In addressing this question, the court conceded that this Court had held, in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 241 (1951), that "if a cause of action arises from fraud and deceit, it is a common-law action of which a federal court has no *jurisdiction* unless there is diversity of citizenship." Pet. App. A, p. 7a (emphasis added). But the court of appeals distinguished *Montana-Dakota,* and upheld the exercise of jurisdiction here, on the ground that "[*j*]*urisdiction* in that case . . . was derived from 28 U.S.C. §§ 1331 and 1337 . . . [whereas] . . . [*j*]*urisdiction* in the present case is granted under . . . the ESA. . . ." Pet. App. A, pp. 7a-8a (emphasis added). There can be no doubt, therefore, that the issue before and decided by the court of appeals was one of jurisdiction.[4]

[4] The opinion of the court of appeals does cause confusion by referring to section 210 of the ESA, rather than to section 211, as the basic statutory grant of jurisdiction. Section 210 establishes a private right of action to remedy legal wrongs caused by "any act or practice arising out of this title." The cause of action thus recognized, however, adds nothing to the jurisdiction conferred by section 211 over "cases or controversies arising under this title." The two statutes employ the same standard, alternately expressed as "arising out of" or "arising under," in defining their scope. The functional identity of the language used in sections 210 and 211 no doubt underlies the court's erroneous reference to section 210. In any event, the language of each statute implicates the body of decisional law that has developed under 28 U.S.C. § 1331 and other similarly worded statutes. Accordingly, in the context of the statutory scheme that governs this case the distinction respondents would make between jurisdiction and cause of action is simply a distinction without a difference.

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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